UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,	)	
Plaintiff	)	
v.	)	***Docket No. 97-308-P-DMC***
SHEILIA WHITCOMB, et al.,	)	
Defendants	)	

MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR DISCHARGE FROM LIABILITY[1]

The plaintiff, The Prudential Insurance Company of America ("Prudential"), brought this action in interpleader and for injunctive relief, naming as defendants the two claimants to the proceeds of a policy of insurance on the life of the late Gary E. Whitcomb. Defendant Holly Hoffman has moved for summary judgment. Prudential has moved for summary judgment on the defendants' counterclaims and for a judgment discharging it from any further liability with respect to the policy proceeds. Defendants Sheilia Whitcomb and the Estate of Gary E. Whitcomb oppose Hoffman's motion. I grant the motions.[2]

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[1] Pursuant to 28 U.S.C.§ 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

[2] Defendant Hoffman has requested oral argument on the pending motions. Docket No. 24. In my opinion, the written submissions of the parties are sufficient for fully and fairly resolving the (continued...)

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following facts are undisputed and properly supported in the summary judgment record.

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[2](...continued)
issues raised. Therefore, the request for oral argument is denied.

Prudential issued Group Life Insurance Policy No. GO-14273 to the AICPA Insurance Trust. Affidavit of Jean Davids dated September 26, 1997 ("First Davids Aff.") (Docket No. 3) ¶ 2. This policy provided life insurance coverage to Gary Whitcomb with a death benefit of $500,000. *Id.* ¶¶ 2, 4. Gary Whitcomb died on June 6, 1996. *Id.* ¶ 3. Sheilia Whitcomb was the wife of Gary Whitcomb at the time of his death and was named personal representative of his estate. *Id.* ¶¶ 6-7.

Hoffman, the former wife of Gary Whitcomb, was the designated beneficiary on the policy at the time of his death. Letter dated June 10, 1997 from Jean Davids to Holly Susan Whitcomb/Hoffman, Exh. G to Affidavit of Jean Davids dated March 16, 1998 ("Second Davids Aff.") (Docket No. 23). Gary Whitcomb and Hoffman were divorced on March 20, 1992. Divorce Judgment, *Whitcomb v. Whitcomb*, Docket No. LEW-92-DV-015, Maine District Court, attached to Whitcomb defendants' Statement of Material Facts ("Whitcomb SMF") (Docket No. 20), at [4]. The divorce judgment awarded to Gary Whitcomb, *inter alia*, "[a]ll life insurance policies in his own name," and required him to "maintain[] a life insurance policy with [Hoffman] as the sole beneficiary to pay the indebtedness of all three mortgages and the note . . . until these properties are refinanced or sold." *Id.* at [2], ¶ 1(d); [4], ¶ 6. The Scarborough property, which was subject to two of the mortgages to which the judgment referred, *id*. at ¶ 1, was refinanced, Transcript of Deposition of Sheilia L. Whitcomb ("Whitcomb Dep."), submitted with Whitcomb SMF, at 30, and the mortgage on the Poland property was foreclosed, Judgment and Order for Foreclosure and Sale, *Citibank (Maine), N.A. v. Gary E. Whitcomb, et al.*, Docket No. 93-CV-304, Maine District Court (Division of Southern Androscoggin), attached to Whitcomb SMF, at [2]-[3], while the note on that property was discharged in bankruptcy, Whitcomb Dep. at 30-31, all before Gary Whitcomb's death.

The policy allows the participant to change the beneficiary of the policy only by filing written

notice of the change. The Prudential Insurance Company of America Group Policy No. GO-14273, Exh. A to Second Davids Aff., Beneficiary Provisions at PRU-00009. Neither Prudential nor its third-party administrator, which coordinated all beneficiary changes under the policy, has any record of the receipt of any beneficiary change by Gary Whitcomb, nor does Prudential have any record that Gary Whitcomb ever requested that it change his benficiary designation. Second Davids Aff. ¶¶ 4, 9-10. Following the death of Gary Whitcomb, Sheilia Whitcomb's attorney notified Prudential that she claimed the death benefit under the policy. Letter dated September 23, 1996 from Neil S. Shankman to Carol Samut, Exh. E to Second Davids Aff. On June 3, 1997 Prudential located Hoffman and advised her of her status as apparent beneficiary. Second Davids Aff. ¶ 14. She has also claimed the death benefit. First Davids Aff. ¶ 8.

III. Discussion[3]

A. The Defendants' Counterclaims

Hoffman has filed a counterclaim seeking a declaration that she is the beneficiary of the policy proceeds, an order awarding the proceeds to her, and other unspecified legal and equitable relief. Answer of Defendant Holly Hoffman to Plaintiff's Complaint for Interpleader and Injunctive Relief and Counterclaim (Docket No. 4) at 6-8. The Whitcomb defendants have filed a counterclaim seeking an order conveying the policy proceeds to Sheilia Whitcomb and alleging that Prudential breached its fiduciary duty to Gary Whitcomb by failing to make a change in beneficiary allegedly requested by him. Answer of Defendants Sheilia Whitcomb and the Estate of Gary Whitcomb to Plaintiff's Complaint for Interpleader and Injunctive Relief, and Counterclaim (Docket No. 6) at [5]-

[3] The parties agree that Maine law governs this dispute.

[8]. Prudential has moved for summary judgment on these counterclaims.

Hoffman opposes Prudential's motion only to the extent that the entry of summary judgment on her counterclaim will deprive the court of jurisdiction to decide the merits of this action. Objection of Defendant Holly Hoffman to Plaintiff's Motion for Summary Judgment (Docket No. 24) at 2. The entry of summary judgment on Hoffman's counterclaim will not have this effect and, in any event, judgment will enter simultaneously on all claims in this action by virtue of this opinion. Summary judgment will be entered for Prudential on Hoffman's counterclaim.

The Whitcomb defendants oppose Prudential's motion for summary judgment on their counterclaim only as to their claim for award of the policy proceeds to Sheilia Whitcomb. They have abandoned their claim for breach of fiduciary duty based on discovery provided to them by Prudential. Memorandum in Opposition to Plaintiff's and Defendant, Holly Hoffman's Motions for Summary Judgment (Docket No. 19) at 2. The remaining claim in the Whitcomb counterclaim will be resolved by my decision on the merits of Hoffman's motion for summary judgment. Accordingly, for reasons that follow, Prudential is entitled to summary judgment on the Whitcomb counterclaim.

B. The Policy Proceeds

Hoffman argues that she is entitled to the policy proceeds as the named beneficiary according to Prudential's records. Group Insurance Certificate, Exh. A to Motion of Defendant Holly Hoffman for Summary Judgment (Docket No. 14). She relies on the absence of the change of beneficiary form required by the policy language and *Life Ins. Co of N. Am. v. Jackson*, 475 A.2d 1150 (Me. 1984). The Whitcomb defendants attempt to distinguish *Jackson* and assert that Hoffman was divested of her interest as beneficiary by the terms of the divorce judgment and that statements made by Gary Whitcomb before his death indicate his intent to make Sheilia Whitcomb the beneficiary

of the policy and that he in fact completed and mailed the form necessary to make the change. Hoffman challenges as hearsay the evidence offered by the Whitcomb defendants concerning the statements of Gary Whitcomb.

In *Jackson*, the children of the decedent claimed the proceeds of a life insurance policy upon which the decedent's former spouse was the named beneficiary at the time of his death. 475 A.2d at 1150-51. They asserted that the following language of the property agreement incorporated into the divorce decree divested the former spouse of her interest as a named beneficiary on the policy:

> Each of the parties has reduced to his or her sole possession all of the goods and chattels which comprise his or her separate property and to the extent that there is marital property to be affected by the provisions of a divorce judgment, each of the parties has reduced to his or her exclusive possession all of said marital property.

Id. at 1151. The Maine Law Court held that "[t]he mere fact that the named beneficiary has been divorced from the insured does not affect the beneficiary's rights to the insurance proceeds," and noted that the judgment "neither explicitly nor implicitly divests [the former spouse] of her expectancy." *Id.* The court held that the former spouse was entitled to the proceeds of the policy.

Here, the Whitcomb defendants argue that the divorce judgment explicitly divested Hoffman of her right to the insurance proceeds by awarding to Gary Whitcomb "all life insurance policies in his own name." To the contrary, this language by itself does not divest Hoffman of her status as beneficiary; it merely provides that Gary Whitcomb owns the policy, as opposed to an award of the policy to Hoffman, with the requirement that it be kept in force by Gary Whitcomb, making it clear that Gary Whitcomb retained the power to change the beneficiary of, or even cancel, any insurance policies then in force. In addition, the judgment also required Gary Whitcomb to maintain a life insurance policy with Hoffman as sole beneficiary "to pay the indebtedness of all three mortgages

and the note . . . until [certain] properties are refinanced or sold." The Whitcomb defendants do not contend that Gary Whitcomb chose to maintain any policy for this purpose other than the existing Prudential policy. While the judgment did not require Gary Whitcomb to maintain the policy or to keep Hoffman as the beneficiary after the properties were refinanced or sold, it also did not provide explicitly that Hoffman would automatically cease to be the beneficiary upon completion of the refinancing or sale of those properties. When those events occurred, Gary Whitcomb simply regained the power to designate another beneficiary or to cancel the policy, neither of which he apparently accomplished.

It reads too much into the language of the decree to suggest that it implicitly divests Hoffman of her status as beneficiary upon the completion of the refinancings or sales. The case law from other jurisdictions upon which the Whitcomb defendants rely to support this argument is distinguishable. In *Hollaway v. Selvidge*, 548 P.2d 835 (Kan. 1976), the insured had requested the necessary forms to change the beneficiary of his life insurance policy from his first to his current wife, but the policy administrators provided the wrong form and the insured died before the correct form arrived. *Id*. at 837-38. In addition, the divorce decree explicitly stated that each party relinquished all "right, title and interest" in the property of the other and agreed never to make a claim to any property allotted to the other by the decree. *Id.* at 838. The latter fact was the entire basis for the court's decision to award the policy proceeds to the current spouse. *Id*. at 839-40. There is no comparable term in the divorce judgment in this case.

In *Estate of Keeton*, 728 S.W.2d 694 (Mo. App.1987), the settlement agreement at the time of the divorce explicitly provided that the divorcing wife transferred any "right, title, interest and benefit" that she might have in certain life insurance policies insuring the life of the decedent to him.

Id. at 696. The court held that the ex-spouse, while still designated as the beneficiary on the policy at issue at the time of death, could only recover the proceeds if she could show that the decedent intended to redesignate her as beneficiary. *Id.* at 698. Here, Hoffman made no such agreement.

Similarly, in *Larsen v. Northwestern Nat'l Life Ins. Co.*, 463 N.W.2d 777 (Minn. App. 1990), the divorcing parties had entered into a stipulated settlement in which each was awarded all "right, title and interest" in the insurance policies covering his or her life. *Id*. at 779. The court held that the basic legal principle that dissolution of marriage does not affect the right of the named beneficiary[4] was overcome by the provision awarding all "right, title and interest" in the policy to the insured. *Id.* at 780. There is no such agreement in the record of the instant case.

The Whitcomb defendants next argue that the statements of Gary Whitcomb, presented through the affidavits of Madeline Whittier (Docket No. 21) and Michael Anastos (Docket No. 22) and the deposition testimony of Sheilia Whitcomb, are evidence of intent to change the beneficiary on the Prudential policy that is sufficient to prevent the entry of summary judgment in favor of Hoffman. Whittier, Sheilia Whitcomb's mother, states that Gary Whitcomb told her at some unspecified time that she "would not have to worry about Sheilia because he had a $500,000 life insurance policy payable to her." Whittier Affidavit ¶ 3. Anastos, an agent for another insurance company, states that Gary Whitcomb told him in February 1995 that he thought he had changed the beneficiary on the Prudential policy from his ex-wife to his current wife, but that he would check into it, Anastos Affidavit ¶ 3, and that Gary Whitcomb later told him that "he had requested the paperwork from the insurance company, filled it out and made the change to Sheilia," *id.* ¶ 4. Sheilia Whitcomb testified that, "[n]umerous times," "Gary told me he had changed the beneficiary on that

[4] This principle is recognized in Maine law. *Jackson*, 475 A.2d at 1151.

policy" to her, Whitcomb Dep. at 38, and that he had to fill out a form to change the beneficiary and "he had changed the beneficiary," *id.* at 77. Hoffman contends that each of these statements is hearsay and thus inadmissible in evidence and unavailable for consideration in connection with a motion for summary judgment. Fed. R. Civ. P. 56(e) (affidavits); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2722 (2d ed. 1983) at 48-49 (depositions). The Whitcomb defendants argues in response that the statements are admissible under Fed. R. Evid. 803(3), an exception to the hearsay rule for statements of intent, and Fed. R. Evid. 804(b)(5), now Fed. R. Evid. 807, a residual exception to the hearsay rule for statements that meet certain specific criteria.

An out-of-court statement by a declarant that he has done an act is excluded by the hearsay rule. Fed. R. Evid. 801 & 802; M. Graham, *Federal Practice and Procedure* § 6754 (Interim ed. 1992) at 583. The statements of Gary Whitcomb recounted by Whittier and Whitcomb, as well as his "later" statement recounted by Anastos, are statements that Gary Whitcomb had changed his beneficiary or had provided for his current wife through a certain insurance policy. All are inadmissible and will not be considered here.[5] The remaining statement recounted by Anastos, that Gary Whitcomb would check into whether he had changed the beneficiary on the Prudential policy, may be construed to be a statement of intent admissible as proof of doing the intended act under Fed. R. Evid. 803(3).

Hoffman argues that evidence of intent to change the beneficiary is insufficient as a matter of law, citing *Estate of Althenn v. Althenn*, 609 A.2d 711 (Me. 1992), and case law from other jurisdictions. In *Althenn*, a friend of the decedent submitted an affidavit in which she stated that she

[5] None of these statements is admissible under Rule 807 because they do not meet the criteria set forth in the rule and do not present the very rare and exceptional circumstances for which the exception was intended to be used. Graham § 6775, at 735.

had accompanied the decedent to the administrative offices at his place of employment, where he told her that he was going to change the beneficiary on his life insurance, and that when he returned he told her that "everything had been taken care of." *Id.* at 713. The Law Court assumed without deciding that the doctrine that equity will decree "that to be done which ought to be done" was applicable to the estate's claim that the decedent's former spouse, the named beneficiary on the insurance policy at issue, should not take the proceeds, but held nevertheless that the evidence submitted by the estate was insufficient to created an issue of material fact. *Id*. at 714. The Law Court noted that the affidavit did not specify who the decedent intended the new beneficiary to be. *Id.* Therefore, the court concluded, "it would be impermissibly speculative to allow the Estate to rely on the . . . affidavit . . . as evidence that [the decedent] intended and took affirmative steps to make the Estate his beneficiary." *Id.*

The holding in *Althenn* is clearly *not* that evidence of a decedent's intent can never be sufficient to support a claim like that of the Whitcomb defendants in the instant case. The Law Court took care in *Althenn* to restrict its holding to the facts of that case, stating only that the evidence of intent submitted in that case was insufficient to avoid the entry of summary judgment. Here, the statement related by Anastos can be construed, when viewed in the light most favorable to the parties objecting to the motion for summary judgment, to specify an intended beneficiary. The issue is whether that evidence is enough, under Maine law, to entitle Sheilia Whitcomb to recover the policy proceeds.

That issue, as well as the parties' disagreement over the availability of equitable relief on the Whitcombs' claim, is resolved by *Clark v. Metropolitan Life Ins. Co.*, 126 Me. 7 (1926). In that case, change of beneficiary on the insurance policy at issue required written notice to the insurer and

submission of the policy itself for endorsement by the insurer. The insured filled out a form indicating a change of beneficiary but did not deliver the policy to the insurer before his death. 126 Me. at 8. The Law Court held that the action to recover the policy proceeds brought by the person named as beneficiary on the form was not an action at equity, but that, even if it were, the insured was required as a matter of law to do all in his power to effect a change of beneficiary in order for the change to be recognized by the court, and he had not done so in this instance. *Id.* at 13. Insofar as the action was one at law, the insured's failure to comply in full with the terms of the insurance contract meant that the plaintiff could not recover. *Id.* at 11.

Clark, while not recent case law in relative terms, has not been overruled, nor has my research generated any evidence that the Law Court has restricted its holding. It is not distinguishable from the case at hand. Without admissible evidence that Gary Whitcomb at least attempted to submit to Prudential a written notice of change of beneficiary to Sheilia Whitcomb, neither Sheilia Whitcomb nor Gary Whitcomb's estate can establish a legal entitlement to the policy proceeds. Hoffman, the named beneficiary of record, is entitled to recover the policy proceeds.

C. Other Matters

Prudential has moved for a judgment discharging it from all liability to the defendants concerning the benefit arising out of the policy and an order enjoining any further action against it by the defendants as to the benefit or the policy, as well as an order awarding it the legal fees and costs it has incurred in connection with this action. The Whitcomb defendants oppose only the request for attorney fees and costs. Hoffman opposes the request for discharge only to the extent that such a discharge would adversely affect the court's jurisdiction over this action, a concern rendered moot by the resolution of the substantive matter at issue by the summary judgment to be entered in

accordance with this opinion.[6] Accordingly, Prudential's motion for judgment will be granted.

Even though the request for injunctive relief is not opposed by the defendants, it is a basic principle of equity that a party seeking injunctive relief must demonstrate that it does not have an adequate legal remedy. *Lopez v. Garriga*, 917 F.2d 63, 68 (1st Cir. 1990). Here, Prudential has made no such showing. The entry of judgment in its favor, discharging it from liability to any of the defendants concerning the life insurance benefit at issue, will provide adequate protection from any further action by any one of the defendants. Injunctive relief is an extraordinary remedy that is not justified under the circumstances of this action.

Attorney fees and costs are usually awarded out of the fund to compensate a disinterested stakeholder who has brought an interpleader action to resolve conflicting claims to the fund. *Centex-Simpson Constr. Co. v. Fidelity & Deposit Co. of Maryland*, 795 F. Supp. 35, 42 (D. Me. 1992). Here, Prudential is such a disinterested stakeholder because it makes no claim to the fund itself. Indeed, it admits liability, has deposited the fund in the court and has asked to be relieved of further liability. A stakeholder fulfilling these conditions is entitled to an award of reasonable costs and attorney fees. *Smith Barney, Harris Upham & Co. v. Connolly*, 887 F. Supp. 337, 346 (D. Mass. 1994). However, a stakeholder is not entitled to an award of attorney fees for resisting a counterclaim in an interpleader action, even when the resistance is successful. *Ferber Co. v. Ondrick*, 310 F.2d 462, 467 (1st Cir. 1962). It is not possible to determine what portion of the attorney fees incurred by Prudential in connection with this action are allocable to its opposition to

[6] Hoffman also indicated that she would not oppose entry of an order enjoining further action by the defendants "when Prudential has met its discovery obligations by paying the money together with interest into Court." Objection of Defendant Holly Hoffman to Plaintiff's Motion for Summary Judgment, etc. (Docket No. 24) at 2. Prudential paid that money into court on April 9, 1998. Docket No. 28.

the parties' counterclaims until detailed records are submitted by Prudential.

Prudential may file a bill of costs pursuant to this court's Local Rule 54.3 and detailed records in support of its request for attorney fees pursuant to Local Rule 54.2. Hoffman and the Whitcomb defendants will then have an opportunity to object to specific portions of those requests, including any objection that the Whitcomb defendants wish to make to any attorney fees associated with Prudential's allegedly belated disclosure of documents. I will then be in a position to make an award of costs and attorney fees in a specific amount to be deducted from the proceeds of the policy before the fund is paid out to the appropriate party.

IV. Conclusion

For the foregoing reasons, the motion of defendant Hoffman for summary judgment is **GRANTED**. The proceeds of the Prudential life insurance policy at issue, plus interest earned, less an amount to be determined to be paid to Prudential for its costs and attorney fees and an amount to be deducted from the income earned on the investment in accordance with this court's order dated February 6, 1998 (Docket No. 13), shall be paid to Holly Hoffman. Prudential's motion for discharge from liability and for summary judgment is **GRANTED** as follows: (i) summary judgment shall be entered in favor of Prudential on the counterclaims of all defendants; and (ii) judgment shall enter discharging Prudential from all liability to any of the defendants in this action concerning the life insurance benefit arising out of the participation of Gary Whitcomb in Prudential Group Life Insurance Policy No. GO-14273.

Dated at Portland, Maine, this 15th day of April, 1998.

David M. Cohen
United States Magistrate Judge